Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America *and* FMC Corporation, MHS Division and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, affiliated with AFL-CIO. Case 33-CD-242

October 30, 1981

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by FMC Corporation, MHS Division, alleging that Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, affiliated with AFL-CIO.

Pursuant to notice a hearing was held before Hearing Officer Donald M. Glynn on March 12, 1981. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, all parties filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Delaware corporation with its principal place of business in Colmar, Pennsylvania, is engaged in the engineering, manufacture, and installation of material-handling equipment. The parties additionally stipulated that during the past year the Employer has purchased and received materials valued in excess of $50,000 which were shipped directly to its various jobsites throughout the United States, including its Silvis, Illinois, jobsite and has performed services for customers throughout the continental United States, which services are valued in excess of $50,000. Accordingly, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated and we find that the Millwrights and the Iron Workers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

On or about December 1, 1980, the Employer began preparatory work for the installation of an overhead power and free conveyor system at the John Deere Foundry in Silvis, Illinois. The employees represented by the Iron Workers performed the preparatory work. Sometime after the commencement of the preparatory work, Duane Booi, construction manager for the Employer, received a telephone call from the business manager for the Millwrights, Doug Banes. Banes indicated that he felt that the employees represented by the Millwrights were entitled to some of the work on the installation of the conveyor system and suggested that a meeting be held to discuss the matter. An on-site meeting was held among representatives of the Millwrights, the Iron Workers, and the Employer on January 27, 1981. Various proposals for assigning the work were offered during that meeting but no decision was made on the work assignment issue. Subsequently, the Employer again assigned the work in dispute to the employees represented by the Iron Workers.

On the morning following the assignment of the work to the employees represented by the Iron Workers, Booi was contacted again by Banes who indicated that Booi would probably be sorry that he made the assignment to the ironworkers because Banes was planning to call his union "Brothers" around the country and would make life "miserable" for the Employer wherever it worked from then on. Thereafter, Booi received a series of telephone calls from Millwrights business managers in various parts of the country. In essence, these business managers informed Booi that they had been contacted by Millwright Locals 2158 about the problem at the John Deere Foundry in Silvis and that they had been asked by Local 2158 to "hurt" or to make "trouble" for the Employer the next time it did work in their respective jurisdictions by, for example, refusing to make estimates for the Employer's jobs.

By mailgram dated January 31, 1981, Banes informed Booi that the Millwrights' dispute with the Employer concerning the John Deere Foundry was being referred to a Joint Industry Board consisting of representatives from a local contractors association, a millwright contractors association, and the Millwrights.[1] Although the Employer employed no millwrights at the jobsite at that time, the mailgram stated that the dispute concerned the Employer's failure to pay proper wages and fringe benefits to millwrights employed at the John Deere Foundry. Booi attended the subsequent hearing before the Joint Industry Board but did not participate because the Employer claimed the issue was jurisdictional and not contractual. The decision of the Joint Industry Board, as stated in its February 13, 1981, letter to the Employer, was that the Employer had violated its collective-bargaining agreement with the Millwrights by failing to pay proper wages and fringe benefits to millwrights "employed by it at John Deere Foundry" and by failing to procure a surety bond in the principal sum of $20,000. The Joint Industry Board ordered the Employer to post the bond, pay the proper wage rates, and make delinquent benefit payments.

By letter to the Employer dated February 18, 1981, William C. Weaver, business manager for the Iron Workers, stated that he was aware of the decision of the Joint Industry Board, but that the Iron Workers did not participate in that board and did not recognize any of the actions of the Joint Industry Board as binding on the Iron Workers. Additionally, Weaver advised the Employer that the Iron Workers intended to take all necessary action, including a strike, to prevent the Employer from reassigning the disputed work to the employees represented by the Millwrights.

B. *The Work in Dispute*

The work in dispute involved the installation of an overhead power and free conveyor system at the John Deere Foundry in Silvis, Illinois.

C. *Contentions of the Parties*

The Employer contends that the employees represented by the Iron Workers should continue to perform the work. In this regard, the Employer notes that the ironworkers have performed the identical work in the past and that that arrangement has proven to be both efficient and economical, and prevents the duplication of men and machines that would be required if the work was divided between the ironworkers and the millwrights. The Employer additionally argues that the ironworkers are more skillful at making the critical welds at the high elevations involved in the installation of the conveyor system and accordingly there is less risk to men and machinery if the employees represented by the Iron Workers perform the disputed work. With regard to collective-bargaining agreements, the Employer argues that its agreements with both the Millwrights and the Iron Workers cover the disputed work and that the 1953 "Conveyor Agreement" between the Iron Workers and the Millwrights is too ambiguous to rely on in any event in assigning the disputed work.[2] Finally, the Employer contends that there is no uniformity in either area or industry practice and so these factors cannot be determinative in making an award of the disputed work.

The Iron Workers essentially agrees with the Employer. It adds that the Employer's preference should be given some weight in determining who should receive the work.

The Millwrights takes the position that the employees represented by the Iron Workers are entitled to perform the work on the superstructure, but that the employees represented by the Millwrights should install the conveyor system below the superstructure. In this regard, the Millwrights argues that the millwrights have welding skills in addition to their ability to align and level the conveyor system and to execute other tasks in its basic assembly. The Millwrights also contends that the industry and area practice is to use composite crews of iron workers and millwrights, and that both the Millwrights collective-bargaining agreement with the Employer and the "Conveyor Agreement" entitle the employees represented by the Millwrights to perform the work below the superstructure. The Millwrights concedes that there might be a minimal loss of efficiency in using a composite crew, but argue that this loss is offset by the advantage of gaining the job skills which the millwrights possess. Finally, the Millwrights argues that the Employer's preference should not be given controlling weight in making an award of the work.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been

[1] The Joint Industry Board is provided for in art. IX of the Millwrights collective-bargaining agreement with the Employer. If the Joint Industry Board decision fails to settle a contract dispute, under the contract the Millwrights may take the dispute to arbitration. A refusal to submit a dispute to the Joint Industry Board or to arbitration or to abide by a determination of either the Joint Industry Board or an arbitrator vitiates the agreement's no-strike clause. A separate procedure is provided in the agreement for the resolution of jurisdictional disputes.

[2] The Employer is not a party to the "Conveyor Agreement."

violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is uncontested that Booi, construction manager for the Employer, received numerous telephone calls from business agents of the Millwrights in various parts of the country threatening to make "trouble" for the Employer if it commenced working in their respective jurisdictions. These statements reasonably conveyed to Booi that the Employer would suffer adverse economic consequences if it failed to reassign the work to the employees represented by the Millwrights.[3] Additionally, the Millwrights presentation of the matter to the Joint Industry Board on the ground that the Employer had violated the collective-bargaining agreement with regard to wages and fringe benefits, despite the fact that the Employer, at that time, employed no millwrights at the John Deere Foundry, was clearly a pretense adopted to mask the coercive tactics employed in an effort to force the Employer to reassign the work to the employees represented by the Millwrights.[4] Furthermore, we find no evidence of any method agreed upon by all parties for adjustment of the dispute.[5]

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[6] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[7]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreements

As the Employer contends, both operative collective-bargaining agreements arguably assign the disputed work to the respective contracting Unions. Thus, article I, "Craft Jurisdiction, Jurisdictional Disputes," sections 2–4, of the Iron Worker collective-bargaining agreement with the Employer "claims for its members . . . conveyors." Similarly, the Millwrights collective-bargaining agreement with the Employer at article I, "Recognition and Scope," section 3, "Occupational Scope," states that this "agreement covers all millwright work, including . . . conveyors." Other conceivably relevant functions claimed are similarly overlapping in scope.

The Employer is not a signatory to nor bound by the 1953 "Conveyor Agreement" between the Iron Workers and the Millwrights. By its terms, its purpose is to "settle jurisdictional disputes directly between the two trades." It is sometimes used by employers who hire composite crews to divide conveyor installation work between the employees represented by the Millwrights and employees represented by the Iron Workers. Those employers who testified that they used the "Conveyor Agreement" in assigning work conceded that the agreement is ambiguous and subject to various interpretations.

Accordingly, this factor does not support an assignment of the work to either group of employees.

2. Company and industry practice

The testimony revealed that although composite crews of ironworkers and millwrights are frequently used in the installation of conveyor systems, crews composed of ironworkers or millwrights alone have also successfully installed conveyor systems. The Employer installed another power and free conveyor system at John Deere in 1977 using only ironworkers. Accordingly, this factor does not favor assignment of the work to either group of employees.

3. Relative skills

It appears that both the employees represented by the Millwrights and the employees represented by the Iron Workers possess the requisite skills for installation of power and free conveyor systems. There is some testimony in the record that the ironworkers are more skilled at doing the welding, particularly that done high in the air. There is also testimony that the millwrights are more skilled with certain facets of the installation such as align-

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[3] *Sheet Metal Workers' International Association, Local Union No. 41, AFL-CIO (B & W Metals Company, Inc.)*, 231 NLRB 122, 123 (1977).

[4] *Brotherhood of Teamsters & Auto Truck Drivers Local No. 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Pacific Maritime Association)*, 224 NLRB 801, 807 (1976). We note in addition that Weaver, the business manager of the Iron Workers, contacted the Employer and threatened to take all necessary action, including a strike, if the Employer reassigned the work.

[5] The Iron Workers did not participate in the above-mentioned proceeding before the Joint Industry Board and was not bound by its determination.

[6] *N.L.R.B. v. Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[7] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

ment, but Construction Manager Booi testified that the Employer had received no complaints from John Deere with respect to those aspects of the installation on the job it had done for John Deere in 1977 using only ironworkers. John Deere was apparently sufficiently satisfied with the workmanship on the previous job to reemploy the Employer for the installation job over which the instant dispute has arisen. Accordingly, this factor does not support an award of the work to either group of employees.

4. Economy and efficiency of operation

The record reflects that the use of composite crews of millwrights and ironworkers generally requires some duplication of personnel and equipment. Construction Manager Booi testified that if the employees represented by the Millwrights performed the work on the conveyor system under the superstructure additional supports would be required and it would be necessary to redesign the installation apparatus. The Millwrights concedes that composite crews may result in some loss of efficiency. This factor favors assignment of the disputed work to the group of employees represented by the Iron Workers.

5. Employer past practice and preference

Consistent with its own past practice, the Employer initially assigned the disputed work herein to the employees represented by the Iron Workers exclusively, and continues to maintain that assignment. Accordingly, the Employer's past practice and current assignment favor an award of the work to the group of employees represented by the Iron Workers.

6. Joint Board determinations

As noted, the Iron Workers did not participate in the Joint Industry Board determination assertedly made under the collective-bargaining agreement between the Millwrights and the Employer. Accordingly, this factor does not favor an award of the work to either group of employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Iron Workers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of economy and efficiency of operation and the Employer's past practice and current assignment. In making this determination, we are awarding the work in question to employees who are represented by the Iron Workers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of the FMC Corporation, MHS Division, who are represented by the International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, affiliated with AFL–CIO, are entitled to perform the installation of the overhead power and free conveyor system at the John Deere Foundry in Silvis, Illinois.

2. Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require FMC Corporation, MHS Division, to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Millwright-Technical Engineers Local 2158 of the United Brotherhood of Carpenters and Joiners of America shall notify the Regional Director for Region 33, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.